STATE OF MICHIGAN

COURT OF APPEALS

ANN BAILLIE,

Plaintiff-Appellant,

v

DIETZ ORGANIZATION, a/k/a PJD, INC., and SURREY PARK APARTMENTS, a/k/a DIETZ PLYMOUTH LIMITED LIABILITY CORPORATION,

Defendants-Appellees,

and

SPIKE'S LAWN SERVICE,

Defendant.

UNPUBLISHED
November 25, 2003

No. 242055
Washtenaw Circuit Court
LC No. 00-001027-NZ

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Plaintiff Ann Baillie appeals as of right from an order granting summary disposition in favor of defendants. We affirm.

In January of 2000, plaintiff, a resident of an apartment complex owned and managed by defendants, slipped and fell on an ice patch covered with snow while carrying her garbage to an apartment complex dumpster. Plaintiff brought suit, and defendants moved for summary disposition pursuant to MCR 2.116(C)(10) based on the open and obvious doctrine. Plaintiff opposed the motion by asserting that the open and obvious doctrine did not apply to snow and ice conditions or defendant's failure to maintain the premises. Plaintiff also argued that the snow and ice in this case was not open and obvious or, in the alternative, that there were special aspects removing it from the open and obvious doctrine. The trial court held that the open and obvious doctrine required summary disposition in defendants' favor.

This Court reviews de novo trial court rulings on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 644 NW2d 151 (2003). With regard to a trial court's grant of summary disposition, the Michigan Supreme Court stated in *Maiden v Rozwood*, 461

Mich 109, 120; 597 NW2d 817 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), that:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

The parties do not dispute that, as a tenant in the apartment complex, plaintiff was an invitee. In general, as a possessor of land, defendants owe "a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. However, this duty does not generally encompass removal of open and obvious dangers." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citations omitted). But, despite the general rule that an invitor has no duty to protect an invitee from open and obvious dangers, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id*. at 517.

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendants by maintaining that the open and obvious danger doctrine does not preclude an invitor's duty to remove snow and ice, citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975), which rejected the notion that snow and ice are open and obvious hazards in all circumstances and cannot give rise to liability. We disagree, as recent decisions of both this Court and our Supreme Court have applied the open and obvious doctrine to cases involving snow and ice, see *Perkoviq v Delcor Homes—Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002); *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002), and the *Quinlivan* analysis is now viewed merely as part of the issue whether there are special circumstances of the condition that make it unreasonably dangerous in spite of being open and obvious. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-9; 649 NW2d 392 (2002).

Accordingly, the next inquiry is whether the ice and snow in this case was an open and obvious condition. *Corey*, *supra* at 5. We find that it was. As this Court held in *Joyce*, *supra* at 238-239:

> The test to determine if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp. (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, this Court "look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Pursuant to MCR 2.116(C)(10), this determination is made by viewing the evidence in a light most favorable to plaintiff as the non-moving party. *Joyce*, *supra* at 239.

In our view, a person of ordinary intelligence would have noticed, as plaintiff testified at deposition that she did, that there was an accumulation of snow on the asphalt and sidewalk when she took the garbage out, there was an accumulation of prior snow on the side of the road, and it had been an unseasonably warm day causing melting, wet spots, and slush areas on the asphalt and sidewalk. Moreover, they would have realized, as plaintiff also said she did, that it was cooling down, especially in light of the fact it was snowing at the time of the incident.

Moreover, we find plaintiff's attempt to distinguish this case from *Joyce* by noting the plaintiff in that case had previously slipped on ice and therefore subjectively recognized the danger, while plaintiff in this case did not, to be without merit. Specifically, the test for determining whether a condition is open and obvious, stated above, is objective and focuses not on whether the plaintiff herself should have known that the condition was hazardous, "but whether a reasonable person in his position would foresee the danger." *Joyce*, *supra* at 238-239. Therefore, we find that "no reasonable juror could have concluded that the condition of the [asphalt, sidewalk, and street] and the danger [they] presented [were] not open and obvious. Accordingly, the trial court properly concluded that the condition was open and obvious." *Id.* at 239-240 (citations omitted).

As stated above, a finding that the snow and ice in this case was an open and obvious danger does not end the inquiry whether defendants owed plaintiff a duty for, as the Michigan Supreme Court stated in *Lugo*, *supra* at 517-518:

> [W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.

"[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id*. at 519.

In determining whether an open and obvious condition presented "special aspects" creating an unreasonable risk of harm, the Court in *Lugo* presented two guideposts: (1) whether the open and obvious condition is effectively unavoidable, such as an open hazard at the only exit to a commercial building; and (2) whether the open and obvious danger poses an unreasonably high risk of severe harm, such as "an unguarded thirty foot deep pit in the middle of a parking lot." *Id.* at 518.

Plaintiff argues that the hazards of the snow and ice in this case were "effectively unavoidable," because she is required to throw her trash in the complex dumpsters and because previous snow plowing, bushes, and mulch prevented her from gaining access to the dumpsters from another way. However, plaintiff did testify that had she known there was ice under the

snow, she would have chosen a different pathway or waited a day to take out the garbage. Thus, by plaintiff's own admission, there were other pathways available and she could have effectively avoided the danger by waiting to take out the garbage. Moreover, plaintiff stated that she only took out one bag of garbage on this occasion, and that she usually takes out multiple bags in her son's wagon. Thus, she has stated no reason why it was unavoidable for her to take this particular bag of trash to the dumpster while it was snowing rather than waiting until it had stopped and taking out multiple bags. Furthermore, her testimony that she might have taken a different route back to the apartment shows that the patch of ice she slipped on was not unavoidable. She clearly made it to the dumpster safely and stated that the sidewalk and street "weren't really slippery" on her trek to the dumpster, and that she did not notice any ice. Therefore, she could have avoided the danger by taking the same route back to the apartment, as she would have known it was safe.

With regard to whether the snow and ice presented an unreasonably high risk of severe harm, the factual similarities between this case and *Joyce* make this Court's findings instructive: "no evidence suggests that the condition was so unreasonably dangerous that it would create a risk of death or severe injury. Unrebutted evidence shows that there was no significant buildup of ice or snow. Indeed, Joyce testified that there was simply a " 'light' layer on the sidewalk." *Joyce*, *supra* at 243. Plaintiff's testimony in this case was almost identical to that in *Joyce*.

Therefore, we hold that, "viewing the evidence in a light most favorable to [plaintiff]," *id.* at 241, "the trial court correctly ruled that [plaintiff] failed to raise a genuine issue of material fact, and no reasonable juror could [have] conclude[d] that the open and obvious condition in this case constituted an unreasonable risk of harm," *id*. at 243.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski